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**IN THE
COURT OF APPEALS OF INDIANA**

SY GROUP,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 18A04-0603-CV-149
)	
GARY HELTON, ET AL.,)	
)	
Appellee-Defendant,)	
)	
EMC MORTGAGE CORPORATION,)	
)	
Appellee/Intervenor.)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Jay Toney, Special Judge
Cause No. 18C05-0210-MI-83
In conjunction with Cause No. 18C05-0109-MI-30

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Sy Group (“Sy”) appeals the trial court’s order granting Gary Helton and EMC Mortgage Corporation’s (“EMC”) motion to set aside a tax deed issued to Sy. We reverse and remand.

Issue

We address one dispositive issue, which is whether EMC’s motion to set aside the tax deed was timely.

Facts

Helton was the owner of the property located at 1715 Clark Street in Muncie. In September 1997 Helton executed a mortgage for the property with United Companies Lending Corporation (“UC Lending.”). The mortgage was recorded. In January 1998 UC Lending assigned the mortgage to Banker’s Trust Company of California (“Bankers”). The assignment apparently was recorded but was not properly indexed by the county recorder’s office.

On October 9, 2001, Sy purchased the property at a Delaware County tax sale. On October 25, 2002, following the statutory redemption period, Sy petitioned the trial court for a tax deed to the property. The trial court granted Sy’s petition and, on January 29, 2003, issued an order directing the county auditor to issue a tax deed.

Several months after the trial court issued its order, between May 2003 and September 2003, Banker's assigned its mortgage interest to EMC.¹ On February 4, 2003, EMC filed a motion to prohibit release of tax sale surplus funds, and on June 6, 2003, EMC filed a motion for release of tax sale surplus funds.² On September 25, 2003, EMC filed a motion to intervene and a Trial Rule 60(B)(6) motion requesting that the trial court set aside the order for the issuance of the tax deed to Sy. The trial court granted EMC's request on February 2, 2006. Sy filed a motion to correct error on February 9, 2006, which the trial court denied. Sy now appeals the trial court's order granting EMC's request to set aside the order for the issuance of the tax deed.

Analysis

Sy argues that the trial court erred by granting EMC's motion for relief from judgment filed pursuant to Indiana Trial Rule 60(B)(6) because EMC did not challenge the issuance of the tax deed within the sixty-day time limit dictated by Indiana Code Section 6-1.1-25-4.6(h). We review a trial court's decision to grant or deny a motion for relief from judgment for an abuse of discretion. Stronger v. Sorrell, 776 N.E.2d 353, 358 (Ind. 2002). "An abuse of discretion occurs where the court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief." Fort Wayne Lodge, LLC v. EBH Corp., 805 N.E.2d 876, 884 (Ind. Ct. App. 2004).

¹ The date on which the assignment was made is unclear. EMC's appellee's brief states that the assignment was made on September 19, 2003. The notary clause on the assignment makes reference to the same date. However, the document itself indicates that the assignment took effect on May 1, 2003.

² We were not able to view these motions because they were not included in the Appellant's Appendix. EMC did not file its own appendix.

When the owner of real property fails to pay property taxes, the property may be sold to satisfy the delinquent taxes. Schaefer v. Kumar, 804 N.E.2d 184, 191 (Ind. Ct. App. 2004), trans. denied. The process by which property is sold is governed by statute, and a valid sale requires material compliance with those statutes. Id. A tax deed creates a presumption that a tax sale and all of the steps leading to the issuance of the tax deed were properly executed. Nieto v. Kezy, 846 N.E.2d 327, 337 (Ind. Ct. App. 2006). This presumption may be rebutted, however, by affirmative evidence to the contrary. Id. One irregularity that may lead to the rescinding of a tax deed is a showing that the parties with interests in the property were not given proper notice of the tax sale and steps preceding the issuance of a tax deed. See Ind. Code § 6-1.1-25-4(7).

In this case, the parties seem to agree that Bankers did not receive notice as required by Indiana Code Sections 6-1.1-25-4.5 and –4.6. Our supreme court has summarized the notice requirements dictated in those statutes as follows: “The first notice announces the fact of the sale, the date the redemption period will expire, and the date on or after which a tax deed petition will be filed. The second notice announces that the purchaser has petitioned for a tax deed.” Tax Certificate Investments, Inc. v. Smethers, 714 N.E.2d 131, 133 (Ind. 1999) (citing Ind. Code § 6-1.1-25-4.5 and –4.6.).

Our statutes further provide direction regarding the way in which the issuance of a tax deed must be challenged. Indiana Code Section 6-1.1-25-4.6(h) provides: “A tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court’s order.”

In B P Amoco Corp. v. Szymanski, 808 N.E.2d 683 (Ind. Ct. App. 2004), trans. denied, this court addressed as a matter of first impression whether a party who challenges the issuance of a tax deed pursuant to Indiana Code Section 6-1.1-25-4.6(h) may do so either through an independent action or through an Indiana Trial Rule 60(B) motion for relief from judgment filed in the same trial court that issued the tax deed. Id. at 686-87, 690. The B P Amoco court held that either method of challenging a tax deed was permissible. Id. at 690. Ancillary to its primary holding, the B P Amoco court also held, “Since an appeal to a tax deed can be filed through either an independent action or a motion pursuant to T.R. 60(B), both remedies are subject to the same sixty-day time frame as stipulated in the current I.C. 6-1.1-25-4.6(h).” Id. (footnote omitted).

The holding in B P Amoco could not be any plainer: The statutorily-dictated, sixty-day time restriction for challenging the issuance of a tax deed means that a challenge must be raised within sixty days of the issuance of the deed, regardless of the vehicle by which it is brought. Here, the trial court issued an order directing the county auditor to issue a tax deed to Sy on January 29, 2003. EMC did not file its motion requesting that the trial court set aside the January 29, 2003 order until September 25, 2003. EMC’s request clearly fell outside the sixty-day time frame and should have been denied for being untimely.

In response to Sy’s timeliness argument, EMC posits that the tax deed issued to Sy is void because Banker’s did not receive notice of the tax sale and petition for tax deed as required by our statutes. As a result, EMC contends that the trial court did not have personal jurisdiction over Banker’s. Adequate notice is required in order for a trial court

to acquire personal jurisdiction over a party. See King v. United Leasing, Inc., 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). We agree that Banker's did not receive the statutorily-required notice, and Sy does not seem to dispute that fact. Nonetheless, we conclude that Banker's/EMC waived the issue of personal jurisdiction prior to the filing of its Trial Rule 60(B)(6) motion and that the motion should have been denied.

"The law is clear that a party not otherwise subject to the personal jurisdiction of a court may nonetheless voluntarily submit himself to that court's jurisdiction by either seeking affirmative relief or by failing to object in a timely manner to the jurisdiction of the court." Hotmix & Bituminous Equip. Inc. v. Hardrock Equip. Corp., 719 N.E.2d 824, 830 (Ind. Ct. App. 1999). We conclude EMC waived any personal jurisdiction argument by seeking affirmative relief when it filed its June 6, 2003 motion for release of tax sale surplus funds. Because we conclude that EMC waived its personal jurisdiction argument when it filed the June 6, 2003 motion, we need not address EMC's contention that the "reasonable time" limitation set forth in Indiana Trial Rule 60(B)(6) actually means that there is no time limitation in which a party must file such a motion.

Conclusion

EMC failed to timely challenge the issuance of the tax deed to Sy and further submitted to the trial court's jurisdiction when it filed a motion requesting a release of surplus funds from the tax sale. The trial court abused its discretion by granting EMC's motion to set aside the tax deed. We reverse and remand for proceeding consistent with this opinion.

Reversed and remanded.

BAILEY, J., and VAIDIK, J., concur.